

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMOND L. GIBSON,

Defendant-Appellant.

UNPUBLISHED
February 21, 2003

No. 236364
Wayne Circuit Court
LC No. 00-007458

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced by the trial court to concurrent terms of imprisonment of not less than five years and eight months to no more than fifteen years on the robbery count and from one to ten years on the assault count. We affirm.

Defendant first argues that the trial court erred in failing to sua sponte instruct the jury that a prosecution witness' prior inconsistent statement can only be used to impeach the witness and not as substantive evidence of defendant's guilt. We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Defendant concedes that he failed to request the instruction and he otherwise did not object to the instructions as given. This issue therefore has not been preserved for appeal. *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Consequently, we review defendant's unpreserved claim of nonconstitutional error only if he establishes plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000).

Here, contrary to defendant's allegation, there is no indication in the record that the prosecution witness' trial testimony included impeachment with a prior inconsistent statement by either the prosecution or defense counsel. In his appellate brief, defendant does not cite a specific page or passage of the trial record where even an attempt to impeach was made, and he points to no moment during the trial where the prosecution or the trial judge suggested that the jury use any inconsistent statements as substantive evidence of guilt. Under these circumstances, defendant has not demonstrated that the trial court's failure to give the limiting instruction constituted plain error affecting his substantial rights. Therefore, defendant is not entitled to

reversal of his conviction on the basis of his claim of instructional error. *Carines, supra*; *People v Hodges*, 179 Mich App 629, 632; 446 NW2d 325 (1989).

Next, defendant argues that the trial court erred in denying his motion to suppress and permitting a prosecution witness to give identification testimony at trial. Defendant maintains that a pretrial corporeal lineup, in which he was identified by the witness as being involved in the robbery and assault, was impermissibly suggestive because of the age differences and physical discrepancies between defendant and the other participants, and the witness otherwise had no independent basis from which to make an identification at trial. We disagree.

This Court will not reverse a trial court's decision to admit identification evidence unless it finds the decision clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001). A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973). The fairness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczuk*, 443 Mich 289, 306, 311-312 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants. *Kurylczuk, supra* at 312 (Griffin, J.), 318 (Boyle, J.). Physical differences generally relate only to the weight of an identification and not to its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). [*People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).]

In the instant case, the prosecution correctly points out that the identification of defendant was not a pivotal issue in this case. The record indicates that defendant testified at trial and admitted that he was one of the three men at the scene of the robbery and assault; indeed, defendant admitted that he was the individual at the crime scene who was identified by certain eyewitnesses as the only perpetrator wearing a red striped shirt. However, defendant claimed that he did not participate in the beating of the victim and in fact attempted to stop the assault on the victim by his two friends. Accordingly, there was no likelihood of irreparable misidentification in light of defendant's testimony that he was one of the three men present at the assault; the only dispute was whether he was just trying to pull his friends off the victim or taking part in the beating.

In any event, even assuming *arguendo* that identification was an issue in this case, defendant has not sustained his burden of demonstrating that, under the totality of the circumstances, the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). As previously noted, physical differences between a suspect and other lineup participants are significant only to the extent they are apparent to the witness and substantially distinguish the defendant from the other lineup participants, thereby creating a substantial likelihood that these disparities, rather than the recognition of the defendant, were the basis of the witness' identification. *Hornsby, supra* at 466. In this instance, defendant has not

demonstrated that the insignificant age-related and physical disparities between the participants in the lineup and defendant rendered the lineup unduly suggestive. Accordingly, we conclude that the trial court did not clearly err in denying defendant's motion to suppress and admitting the identification testimony at issue during trial.

Affirmed.

/s/ William C. Whitbeck

/s/ Richard Allen Griffin

/s/ Donald S. Owens